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the Uniform Rules of Evidence,[51] these affidavits would be received. The Court in the instant case avoids considering whether the trial court should receive evidence of the influence of the misconduct upon the juror's mind in reaching his verdict. Unless the method of evaluating the effect of the misconduct on the verdict is objective, the court is probing into the juror's mental processes during his deliberations. The patent injustice inflicted upon a losing defendant requires a re-evaluation of the policy grounds underlying the adoption of Lord Mansfield's rule to juror misconduct outside the jury room, instead of repeating the dogma that a juror may not impeach his own verdict.

ARTHUR A. RUSS, JR.

FUTURE INTERESTS—APPLICATION OF STATUTE TO BAR ENFORCEMENT OF MATURED REVERTER HELD UNCONSTITUTIONAL

On May 11, 1854, John Townsend and wife deeded land and a building to the Trustees of Walton Academy. The deed, duly recorded, contained a reverter clause providing that the deed was to be valid only so long as the premises were used for an Academy and for nothing else. On failure of this condition the premises were to revert to Townsend and his heirs.[1] They were used for educational purposes by Walton Academy until April 1, 1962, when such use was discontinued. Plaintiff Board of Education succeeded to the Academy's rights. Under section 345(3) of the New York Real Property Law (the statute at issue) defendant was required to file a Declaration of Intention to Preserve Restrictions on the Use of Land, by Sept. 1, 1961. This Declaration was filed on April 13, 1962, seven months after the deadline. Plaintiff Board of Education sued for title on stipulated facts, under the same statute (discussed infra), which was designed to eliminate certain restrictions on the use of land, and won a unanimous judgment in the Appellate Division.[2] On defendants' appeal, *held*, reversed. The recording provisions of section 345 of the New York Real Property Law are unconstitutional in that they impair the obligation of contracts and deprive defendants of property without due process of law, when applied so as to bar enforcement of a reverter which matured after the date the statute set for filing notice of intent to preserve the reverter. Chief Judge

dict . . . or concerning the mental processes by which it was reached." Comment, 47 Mich. L. Rev. 261 (1948).

51. Rule 41 "Upon an inquiry as to the validity of a verdict . . . no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of a juror as influencing him to assent to or dissent from the verdict . . . or concerning the mental processes by which it was determined."

1. The clause read: "Provided nevertheless that the said lot and the building thereon shall be used for the purposes of an Academy and no other then this deed shall remain in full force and effect otherwise it shall become Void and the premises herein conveyed shall revert to the said John Townsend party of the first part and to his heirs." Instant case at 364, 207 N.E.2d at 183, 259 N.Y.S.2d at 131 (1965).

2. Board of Educ. v. Miles, 18 A.D.2d 87, 238 N.Y.S.2d 766 (3d Dep't 1963).

Desmond and Judge Fuld dissented, voting to affirm on the Appellate Division opinion. Judge Bergan did not participate. *Board of Educ. v. Miles*, 15 N.Y.2d 364, 207 N.E.2d 181, 259 N.Y.S.2d 129 (1965).

Section 345 of the New York Real Property Law was enacted in 1958 following Law Revision Commission reports recommending the elimination of non-substantial restrictions on the use of land.[3] Under section 345, which is retroactive[4] in application, an owner of a possibility of reverter[5] or right of entry for breach of condition subsequent must record a Declaration of Intention to Preserve Restrictions on the Use of Land[6] not less than 27 nor more than 30 years after the date of creation of the limitation. This Declaration must be renewed every ten years. An additional recording provision, the basis of litigation in the instant case, provides that conditions created prior to Sept. 1, 1931, must have been recorded by Sept. 1, 1961. Failure to duly record results in extinguishment of the right.[7] This section does not deal solely with old, useless limitations, but affects potentially valuable restrictions as well.[8]

An estate in reversion (reverter) is the residue of an estate left in the grantor, his heirs or devisees, after the termination of an estate granted by

3. N.Y. Law. Revision Commission Reports and Recommendations, N.Y. Leg. Doc. No. 65(B), 211 (1958); No. 65(P), 689 (1951). See Comment, *Constitutional Problems Presented by the Retroactive Extinguishment of Forfeiture Restrictions on the Use of Land: Sections 345-349 of the New York Real Property Law*, 27 Albany L. Rev. 267 (1963); Sparks, *Possibilities of Reverter and Right of Entry*, 33 N.Y.U. L. Rev. 1193 (1958).

4. "A retroactive statute is one which gives to preenactment conduct a different legal effect from that which it would have had without the passage of the statute." Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960).

5. A possibility of reverter is defined as "the undisposed of interest remaining in the grantor, or in the heirs of the devisor when the owner of land in fee simple absolute has conveyed or devised it in determinable fee, in fee simple conditional, or in determinable fee simple conditional." 1 Simes, Future Interests § 177 (1936). The definitive feature of a possibility of reverter is that the grantor retains the right to automatically regain the fee upon the happening of an event. Fausett v. Guisewhite, 16 A.D.2d 82, 225 N.Y.S.2d 616 (3rd Dep't 1962).

6. N.Y. Real Prop. Law § 345(3).

7. N.Y. Real Prop. Law § 345(8) lists exceptions to the application of § 345. The section does not apply when the condition or limitation is created in favor of (a) the United States, New York State, or their governmental subdivisions; (b) the owner of a reversion following an estate for life; (c) the owner of a reversion following an estate for years where the number of years for which such estate was created will expire less then 70 years after the time recording of an initial declaration would otherwise be required under § 345; (d) the owner of a reversion on a lease of communication, transportation or transmission lines; (e) a mortgagee or contractor-vendor of land or the holder of any other security interest in land.

Section 345(9)(a) leaves the owner with injunctive or compensatory relief to the extent the right is also imposed by a non-forfeiture restriction such as a covenant.

8. See Law Revision Commission Reports and Recommendations, N.Y. Leg. Doc. No. 65(P), 712-13 (1951).

9. Sorrels v. McNally, 89 Fla. 457, 105 So. 106 (1925); Norman v. Horton, 344 Mo. 290, 126 S.W.2d 187, 125 A.L.R. 531 (1939); Brown v. Guthery, 190 N.C. 822, 130 S.E. 836 (1925); King v. Scroggin, 92 N.C. 99, 53 Am. Rep. 410 (1885); Copenhaver v. Pendleton, 155 Va. 463, 155 S.E. 802, 77 A.L.R. 324 (1930); Powers v. Trustees of Caledonia County Grammar School, 93 Vt. 220, 106 Atl. 836 (1919). *Cf.* Helvering v. Wood, 309 U.S. 344 (1940).

him.[9] It arises only by operation of law,[10] and is an actual estate *in praesenti*, vested in the sense of a present fixed right of enjoyment.[11] A *possibility* of reverter,[12] however, is not a vested property right, but a mere future expectation, and thus may be defeated by statute,[13] as it cannot be claimed to be "property" taken without due process of law. A number of states have statutes which provide for forfeiture of reverter or reentry rights on breach of condition subsequent; such statutes are of three types. Under one type of statute, the owner of a reversionary interest must file notice of intent to preserve it.[14] Failure to do so extinguishes the right. Under the Statute of Limitations approach, after passage of a certain time, if the specified event actuating the reverter does not occur, the limited estate is made absolute, regardless of the terms of the creating instrument.[15] Finally, under the third approach, notice of intent to preserve the interest must be filed, *and* an action must be brought to enforce it.[16] Failure to bring the action extinguishes the right.

Statutes intended to preserve the free alienability of land have their basis in the police power of the state, and must thus be related to the public health, safety, welfare, and possibly economic needs.[17] Recording acts have their police power basis in the prevention of fraud on subsequent purchasers.[18] This basis is sufficient to sustain the retrospective impairment of vested rights[19] or the alteration (again retrospectively) of private contractual obligations.[20] Although

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10. Carter v. Lewis, 364 Ill. 434, 4 N.E.2d 853, 108 A.L.R. 458 (1936); Akers v. Clark, 184 Ill. 136, 56 N.E. 296, 75 Am. St. Rep. 152 (1900); Norman v. Horton, 344 Mo. 290, 126 S.W.2d 187, 125 A.L.R. 531 (1939); Copenhaver v. Pendleton, 155 Va. 463, 155 S.E. 802, 77 A.L.R. 324 (1930); Jordan v. City of Benwood, 42 W. Va. 312, 26 S.E. 266, 57 Am. St. Rep. 859, 36 L.R.A. 519 (1896).

11. Norman v. Horton, 344 Mo. 290, 126 S.W.2d 187, 125 A.L.R. 531 (1939).

12. See note 5, *supra*.

13. Bass v. Roanoke Nav. & Walter Power Co., 111 N.C. 439, 16 S.E. 402, 19 L.R.A. 247 (1892); Prall v. Burckhartt, 299 Ill. 19, 132 N.E. 280, 18 A.L.R. 992 (1921).

14. *E.g.*, Iowa, § 614.17 I.C.A. (1943). See Tesdell v. Hanes, 248 Iowa 742, 82 N.W.2d 119 (1957).

15. Florida, F.S.A. 689.18 (1951). See Biltmore Village v. Royal Biltmore Village, Inc., 71 So. 2d 727, 41 A.L.R.2d 1380 (Fla. 1954); Murrison v. Fenstermacher, 166 Kan. 568, 203 P.2d 160 (1949). *Contra*, Trustees of Schools v. Batdorf, 6 Ill. 2d 486, 130 N.E.2d 111 (1955). Other states have similar statutes. See, *e.g.*, Illinois, S.H.A. ch. 83. § 10a (1941).

16. Indiana, Burns Ind. Stat. Anno. §§ 2-628-638 (later repealed). With respect to this type of statute see Blinn v. Nelson, 222 U.S. 1 (1911); Turner v. New York, 168 U.S. 90 (1897).

17. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934); Weiler v. Dry Dock Sav. Inst., 258 App. Div. 581, 17 N.Y.S.2d 192 (1st Dep't 1948), *aff'd*, 284 N.Y. 630, 29 N.E.2d 938 (1940); State v. Ross, 259 Wis. 379, 48 N.W.2d 460 (1951).

18. "Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts; such too is the power to pass acts of limitations, and their affect." Jackson *ex dem.* Hart v. Lamphire, 28 U.S. (3 Pet.) 280, 289 (1830).

19. Curtis v. Whitney, 80 U.S. (13 Wall.) 68 (1871); Jackson *ex dem.* Hart v. Lamphire, 28 U.S. (3 Pet.) 280 (1830); Matter of Pardee v. Rayfield, 192 App. Div. 5, 182 N.Y. Supp. 3 (4th Dep't 1920), *aff'd*, 230 N.Y. 543, 130 N.E. 886 (1920); Leonard v. Harris, 147 App. Div. 458, 131 N.Y. Supp. 909 (3d Dep't 1911), *aff'd*, 211 N.Y. 511, 105 N.E. 1089 (1918). *Contra*, Varick's Executors v. Briggs, 22 Wend. (N.Y.) 543 (1839).

20. Twentieth Century Associates, Inc. v. Waldman, 294 N.Y. 571, 63 N.E.2d 177, 162 A.L.R. 197 (1945). See also the cases cited in note 19 *supra*.

at one time the constitutional prohibition against this was considered absolute,[21] the courts have, in the name of advancing the public welfare, adopted the reasonableness standard used to test legislation under the due process clause.[22] Given a reasonable time for compliance with the statute, such legislation is valid.[23]

The Court reasoned that in order to sustain the recording provisions of the statute (section 345(4) of the New York Real Property Law), a police power basis had to exist either in the prevention of fraud on subsequent purchasers or in clearing titles of contingent reversionary interests to preserve the free alienability of land. Since there was no legislative purpose of protecting subsequent grantees, the statute could not be sustained on the same basis as recording acts. The court then assumed, *arguendo*, the validity of a statute similar to that upheld in *Wichelman v. Messner*[24] (which extinguished interests more than forty years old, unless notice of them was recorded) and held the New York recording provision unconstitutional as being impossible to comply with, *i.e.*, the reverter had not matured at the time the statute barred it, and no one could ". . . have known prior to the cut-off date who would be parties in interest at the time when the reverter took effect."[25] Thus, under these particular facts, ". . . it would be necessary for unascertained persons, perhaps not even in being, to have recorded a declaration of intention to preserve a reverter which would not take effect in enjoyment until an indefinite future time."[26] The case was then likened to *Biltmore Village v. Royal*,[27] which held a Florida statute, also canceling certain reverters,[28] unconstitutional on both due process and impairment of contract obligations grounds.[29] Finally, the court refused to sustain the statute as a Statute of Limitations, as it ". . . purports to bar the remedy

21. Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843); Ogden v. Saunders, 25 U.S. (12 Wheat.) 212 (1827); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819).

22. W. B. Worthen Co. v. Kavanagh, 295 U.S. 56 (1935); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

23. Meigs v. Roberts, 162 N.Y. 371, 56 N.E. 838 (1900). See generally Bayse, Clearing and Titles (1953); Hammond, *Limitations Upon Possibilities of Reverter and Rights of Entry*, in Current Trends in State Legislation 1953-54 (1955); Aigler, *Constitutionality of Marketable Title Acts*, 50 Mich. L. Rev. 185 (1951); Aigler, *A Supplement to "Constitutionality of Marketable Title Acts"—1951-1957*; Bayse, *Trends and Progress—The Marketable Title Acts*, 47 Iowa L. Rev. 261 (1962); Nelson, *Conveyancing in New York*, 43 Cornell L.Q. 617 (1958).

24. 250 Minn. 88, 83 N.W.2d 800, 71 A.L.R.2d 816 (1957). The case was distinguished on two grounds, first because the plaintiff did not have record title for the requisite statutory period, and secondly because six years had elapsed between cesser of use for a school and commencement of action to enforce the reverter.

25. Instant case at 373, 207 N.E.2d at 186, 259 N.Y.S.2d at 137 (1965).

26. *Ibid.*

27. 71 So. 2d 727, 41 A.L.R.2d 1380 (Fla. 1954).

28. Fla. Stat. Ann. 689.18 (Cum. Supp. 1953). The statute cancelled all reverter provisions in plats or deeds in effect for more than 21 years. The holder of the reversionary interest had one year from the date of the act to institute suit to enforce the right; this of course could apply only to matured reverters.

29. Although the court did not elaborate, presumably the due process ground was similar to the instant case. The contract obligation ground was probably that it alters the rights and duties of the parties under the deed.

before the right to enforce it has matured . . .,"[30] the usual rule being that a Statute of Limitation does not start to run against an owner of a possibility of reverter or right of reentry until that owner has a right of action to recover possession of the land.[31]

The Appellate Division upheld the statute even though it was retroactively applied to a reverter that did not take effect until seven months after the date for filing notice of intention to preserve pre-1931 reversionary interests had expired. The lower court thought such application ". . . a reasonable and salutory public control of the use of a peculiar form of property which, without regulation, could adversely affect free alienability and development of land. It is neither," said the court, "the impairment of contract nor a denial of due process to require a man who owns so tenuous and troublesome an interest to put it down in a public record."[32] Whether one agrees or disagrees with this rather cavalier treatment of what is in this particular case a valuable property interest is largely a matter of policy choice,[33] with the right of property owners to devise as they wish opposed to the desire of society to maintain freely alienable realty. Even though "it is true that we in this country have apparently become accustomed to viewing with relative equanimity the uncompensated losses of valuable interests sustained by property owners who fail to comply with the recording acts which are found in every one of our jurisdictions,"[34] it would seem there is an element of unfairness present when this philosophy is applied in a situation where it is truly *impossible* to comply with the statute. The crucial question in this case is whether such compliance is indeed impossible. The provision governing parties eligible to file notice of intent to preserve these interests reads: "a person or persons having a right of entry in the event of breach . . . or having after breach . . . a right of entry . . . may record a declaration. . . ."[35] Following the rule that statutes are to be construed so as to uphold their constitutionality,[36] it would seem an easy matter to read this provision so that *any* person owning the right could file at any time before maturing of the reverter, as well as within the prescribed period after matura-

30. Instant case at 374, 207 N.E.2d at 187, 259 N.Y.S.2d at 137 (1965).

31. Monte v. Montalbano, 274 Ala. 29, 145 So. 2d 197 (1962); Luther v. Patman, 200 Ark. 853, 141 S.W.2d 42 (1940); Nearing v. City of Bridgeport, 137 Conn. 205, 75 A.2d 505 (1950); School Dist. v. Hanson, 186 Iowa 1314, 173 N.W. 873 (1919); Dewey v. McLain, 7 Kan. 126, 12 Am. Rep. 418 (1871); McDonald v. Burke, 288 S.W.2d 363 (Ky. 1955).

32. Board of Educ. v. Miles, 18 A.D.2d 87, 93, 238 N.Y.S.2d 766, 772 (1963), *rev'd*, 15 N.Y.2d 364, 207 N.E.2d 181, 259 N.Y.S.2d 129 (1965).

33. It will be recalled that the statute was directed primarily at non-substantial limitations on land, though it was conceded some valuable interests might also be eliminated. With respect to these it seems fair to state the Law Revision Commission wished to give the holders of such interests the minimum notice required by the Constitution. See note 8 *supra*, and accompanying text. However, most of these interests have little or no economic value. See Orgel, Valuation Under the Law of Eminent Domain (1936); Comment, 34 Mich. L. Rev. 530, 537 (1936).

34. N.Y. Law Revision Commission Reports and Recommendations, N.Y. Leg. Doc. No. 65(P) 689, 714 (1951).

35. N.Y. Real Prop. Law § 345(2).

36. *E.g.*, Nebbia v. New York, 291 U.S. 502 (1934).

tion. There is no real reason why the person who is *eventually* going to enforce the right has to be the one filing the notice. This is particularly so in view of section 59 of the N.Y. Real Property Law, which provides for the alienability and devisability of reversionary interests. The *Biltmore*[37] case, relied on by the Court of Appeals, involved a more drastic statute, as there, a *suit* had to be brought to enforce the reverter within one year from the date of passage of the act, and that year had expired before actuation of the reverter, making suit impossible.[38] The N.Y. Law Revision Commission anticipated the elimination of a substantial number of useless, unenforced reverters and rights of reentry when they stated: "With advantages of such magnitude in prospect, the incidental sacrifices of the interests of many individuals might be tolerated without too great difficulty."[39] It is submitted that even assuming, *arguendo*, that such legislative manhandling of property interests is desirable, retroactive application is not consonant with traditional notions of due process when applied to the particular facts of this case.[40] However, if preservation of alienability is of such importance that the legislature deems a statute of this type necessary, it would seem more reasonable to hold that *any* owner of the reversionary interest may file at *any* time up to the statutory cut-off date.

ALAN A. RANSOM

INSURANCE LAW—MANDATORY ARBITRATION—INADEQUACY OF MVAIC ARBITRATION AWARD NOT GROUNDS FOR JUDICIAL REVIEW

Decedent while operating his automobile struck a bridge abutment. He was then struck from behind by a hit-and-run automobile and was fatally injured. Decedent's estate and his insurance company failed to agree on an appropriate amount for damages and in accordance with the terms of the policy, an arbitration was held. The 23-year old decedent was survived by his widow and two infant children. Even though a conservative estimate would set the value of decedent's life at $10,000,[1] the arbitrator awarded the estate $500.00. On motion to vacate the arbitrator's award the Supreme Court, Special Term, set aside

37. Biltmore Village v. Royal Biltmore Village, Inc., 71 So. 2d 727 (Fla.), 41 A.L.R.2d 1380 (1954).

38. The statute does provided, however, that the restriction may be enforced by equitable remedies.

39. N.Y. Law Revision Commission Reports and Recommendations, N.Y. Leg. Doc. No. 65(P), 689, 714 (1951).

40. See Simes & Taylor, Improvement of Conveyancing by Legislation 288-89 (1960), in which the authors set forth two Model Acts dealing with possibilities of reverter and rights of entry. The first, which simply limits their duration, is not retroactive. The second, limiting their duration when the required notice is not filed, is wholly retroactive. The authors support its constitutionality on the reasonable recording requirement of the *Wichelman* case.

1. Justice Bergan, dissenting in the instant case, valued the decedent's life at 60,000 dollars. The policy limits, however, would preclude an award in excess of 10,000 dollars. Instant case at 887, 258 N.Y.S.2d at 421.